**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **UNITED STATES OF AMERICA** | : | **Case # 1:22-cr-00121-TNM** |
| | : | |
| **v.** | : | |
| | : | |
| **Jared Paul Cantrell** | : | |
| **Quentin G. Cantrell** | : | |
| **Eric Andrew Cantrell** | : | |

**RESPONSE TO MOTION IN LIMINE TO PRECLUDE ARGUMENTS AND EVIDENCE ABOUT ALLEGED LAW ENFORCEMENT INACTION**

Defendant Quentin G. Cantrell ("QGC") hereby respectfully submits its opposition to the Government's Motion to Preclude. ("Motion," Dkt. 55.)

## I. Introduction

The Government's Motion makes two distinct prayers for relief, that (1) Defendants be precluded from asserting an entrapment affirmative defense, and (2) that all evidence of police inaction be precluded and Defendants be precluded from arguing that police inaction rendered Defendants' conduct lawful. As set forth more fully below, both are unsupported by caselaw, and the Court should therefore deny both.

## II. Legal Standard

### *A. Estoppel*

The Government cites *Cox* and the 10th Circuit legal standard for determining whether a prosecution is estopped for entrapment. *U.S. v. Cox,* 906 F.3d 1170. QGC agrees that *Cox* states the appropriate standard. Also see *U.S. v. Gutierrez-Gonzalez*, 184 F.3d 1160, 1167 (1999), for a good summary of entrapment estoppel case law.

However, the Government appears to argue that *Chrestman*, a recent trial court decision, held that estoppel cannot apply in any January 6 case, because the capitol police did not have legal authority to grant permission to members of the crowd to enter. Dkt. 55, p. 14; *Chrestman*, at 32. The Government appears to be arguing for an interpretation that would effectively read entrapment out of

existence entirely, since police never have the authority to abrogate law—as the Government specifically argues a few pages later. Dkt. 55, pp. 15-16 (citing *Williams*).

In the first place, *Chrestman*, a trial court decision, cannot overturn Supreme Court precedent. See, e.g., *Cox v. Louisiana*, 379 U.S. 559 (1965). The Supreme Court held in *Cox v. Louisiana* that, having implicitly informed Cox that the demonstration was not "near" the courthouse by initially allowing the protest 101 feet from the courthouse, the subsequent decision to arrest and prosecute Cox—despite explicit instructions to disperse—constituted "an indefensible sort of entrapment by the State." *Id*., at 571 (quoting *Raley v. Ohio*, 360 U.S. 423, 426). In exactly the same way, if police behavior effectively informed individuals at the Capitol that they were permitted to go some places and not others, and those individuals relied upon that tacit representation to go where the police allowed them but not to those where the crowd was not permitted, subsequently asserting criminal liability for that reliance is "an indefensible sort of entrapment by the State."

But *Chrestman* does not purport to stand for the broad proposition for which the Government cites it. *Chrestman* merely noted, reasonably enough, that estoppel should not apply in situations where police "purport to allow one to commit, for example, murder or robbery." *U.S. v. Chrestman*, 525 F.3d 14, 31 (Dist. D.C.)(internal quotations removed). The fourth element of the entrapment standard articulated in *U.S. v. Cox*, "the defendant's reliance was reasonable," ensures that estoppel does not apply in cases of murder or robbery, because no one could reasonably believe such conduct was lawful, regardless of what a police officer might say. The *Chrestman* court held that, likewise, an individual who showed up armed with an axe handle, tactical gear, and a gas mask, who organized others to confront the police, who stood directly in front of a police line and threatened them, yelling "You shoot and I'll take your [expletive deleted] ass out!," and who physically broke through a police barricade and overwhelmed the police line to gain entry, could not plausibly argue that he was entrapped. *Chrestman*, at 27-28. QGC respectfully submits that the *Chrestman* court's application of the *U.S. v. Cox* standard to the facts of its case does not conflict with *Cox v. Louisiana*, and certainly does not constitute a blanket holding that estoppel cannot apply in any January 6 case, as the Government's argument would have it.

*B. Police Inaction*

The Government argues that another recent trial court case, *Williams*, stands for the proposition that a police officer "cannot unilaterally abrogate criminal laws." Dkt. 55, pp. 15-16. While that is of course true as far as it goes, it does not imply that police conduct cannot be relevant to deciding the state of mind of a January 6 defendant. The statute has a specific intent element, and that element cannot be read out of existence merely on the ground that police conduct contributed to the defendant's state of mind. Police action can be observed, and, one would hope, would be an important indicator to members of a crowd that informs them what they should and should not do.

Furthermore, the *Williams* court noted that the defendant had proffered no evidence that government inaction played a part in the defendant's state of mind. *Williams*, at 2. To the extent *Williams* is read to say that police inaction, as a matter of law, cannot at least contribute to establishing the absence of mens rea, it must be distinguished, or it contradicts the statutory requirement of a specific mens rea element of the crime (as well as the Supreme Court precedent).

**III. Argument**

*A. Estoppel*

The Government argues that QGC should be estopped from offering any evidence or argument that the behavior of the police constituted entrapment on the ground that such behavior was, necessarily, "a waiver of the law beyond [their] lawful authority." Dkt 55, p. 14 (quoting *Chrestman*). Taken seriously, this would effectively read entrapment out of the law entirely, since the very function of the entrapment defense is to prevent criminal liability for conduct that is otherwise unlawful.

The entrapment defense is necessary to vindicate due process rights of defendants who have been mislead by government agents, and there is relatively little legitimate cost to the government for its continued existence. Where government agents deliberately mislead, it is particularly important that courts check such corrupt conduct. But even in cases where the government agents merely acted in error, there is little cost to vindicating their decision. For example, in *Cox v. Louisiana*, the statute being enforced prohibited demonstrations "near" a courthouse. *Cox v. Louisiana*, 379 U.S. 559 (1965). This

term naturally involves line-drawing problems, and police enforcing the statute will naturally have to interpret this term. Even if a court might later conclude that the line ought to have been drawn somewhere else, it hardly makes sense to prosecute members of the public who deferred to the police officers' interpretation at the time.

Such interpretations may be either too strict or too lenient. If they are too strict, the public can nevertheless face arrest and prosecution, based merely on the refusal to follow police instructions; the only available remedies are after-the-fact. On the other hand, the police's interpretation might be too lenient, but surely any resulting danger must not be too great or obvious, or the police would not adopt such an interpretation.

Furthermore, the police's ability to regulate the public's conduct is enhanced—not harmed—if the law vindicates their decisions to defer to the police, rather than rendering them legally liable for mistakenly doing so. The public should not be encouraged to second-guess the police in a potentially dangerous situation, and that is precisely what would result from the Government's proposed interpretation of *Chrestman*. The Court should therefore deny the Government's motion to preclude an entrapment defense.

*B. Police Inaction*

Leaving the entrapment defense aside entirely, the Government's second prayer for relief argues that *Chrestman* implies that QGC should not be permitted even to attempt to negate one of the elements of the crime, namely, that he "knowingly entering a restricted area." See 18 U.S.C. § 1752(a)(1). The government argues that entering was inherently unlawful, and, consequently (citing *Chrestman*), that police inaction cannot render it lawful. Dkt. 55, p. 15. But this puts the cart before the horse. Merely entering was not unlawful—absent the required mens rea, entering was *not* unlawful. Furthermore, police inaction could (and did) contribute to that absence of knowledge. The Government is arguing, in effect,

that QGC should not be permitted to offer evidence and argument merely on the ground that it would negate an element of the crime.

QGC expects at trial to elicit testimony that one or more of the defendants specifically looked to the police to inform them where the defendants could and could not go. The situation was chaotic, involved a very large crowd, and appeared to have been largely unexpected. The defendants had not even planned to be there, and went only because of Trump's invitation. Although QGC believed that they were permitted to be at the Capitol, he expected there to be places that they were not permitted to go, and that those places might change over time. When the defendants encountered police blocking access to certain places and not others he believed it reflected the places to which they were and were not permitted to go, respectively.

The Government tries to rebut this obvious fact with quotes from interviews with two unidentified officers, who said they were allowing access for another reason, namely, that they doubted their ability to effectively bar public entry. Even if the Government could prove this[1], it would be relevant only if QGC knew it, and he was obviously not privy to the states of mind of police officers he had never even seen or met.

On the other hand, the Government has repeatedly indicated that it intended to try to show that police had effectively communicated to QGC that he was not permitted to enter, and, because this was never communicated in words, the Government has suggested that it would try to show that it was

[1] This evidence was only made available to defendants via so called "global discovery." As QGC noted in Dkt. 33, doing so was not effective production, because it would have been impractical to sift through the terrabytes of data, which took literal days of computer time to transfer, most of which was either irrelevant or only very marginally relevant to QGC's case. Even now the officers in question have not been identified. Consequently, this evidence is both out-of-time and hearsay, and is inadmissible for either or both reasons.

implicit in police action. It would violate due process if the Government were permitted to use police conduct as a sword while QGC was precluded from using it as a shield.

The police decision to bar entry to certain places and allow it to others is highly probative evidence of state of mind, and the Court should deny the Government's motion to preclude it.

*C. Response to Government's Factual Background*

QGC objects to most of the Government's "Factual Background," on the ground that it mischaracterizes evidence and cites to inadmissible evidence. However, because the Government's motion is based on its legal contentions that apply equally to all January 6 cases, the factual contentions do not generally appear to be relevant to its motion, and so QGC will not attempt to refute every factual contention. Nevertheless, a few important examples follow.

Most of the photos in the Factual Background appear to come from 3d-Party video that is the subject of a motion in limine, (Dkt. 51), though the Government does not identify the photos, their source, or a sponsoring witness. Such evidence is inadmissible hearsay, and violates Rule 403 and the 6th Amendment. Some of these photos have been altered by the Government by the addition of annotations, e.g., by the addition of colored circles that it contends identify the defendants. Even if the underlying photo were admissible, such annotations are argument, not evidence.

Likewise, Government characterization of evidence is, at best argument. The Motion begins with the assertions that "the Cantrells marched down Constitution Avenue." Dkt. 55, p. 1. The still photos that the government offers to support this contention do not show QGC "marching." QGC notes that Count 4 in this action is for "Parading, Demonstrating, or Picketing," and, therefore, that the term "marching" is not a benign choice of words. But if what QGC did was "marching," then everyone who walks along a crowded street is "marching." He was not moving in formation with anyone else, nor was he high-stepping, displaying signs, chanting, or doing anything else that one normally associates with "marching."

The Government's Factual Background then asserts that the Cantrells "climbed to the Upper West Terrace through the Northwest scaffolding." Dkt. 55, p. 2. This at least strongly suggests that

QGC climbed the scaffolding to get to the West Terrace. The still photo offered as evidence to support this contention does not show it, and it is false.

Then then Government makes a factual assertion that not only is not supported by the photos it embeds, but appears to be new evidence, introduced in violation of the Court's scheduling order—namely, that the "MPD was playing a 'dispersal order' telling all people to leave the area." QGC does not know the origin of this assertion, and has never had any opportunity to investigate that evidence. Dkt. 55, p. 2.

Another inadmissible piece of evidence produced for the first time to QGC with this Motion is the YouTube video of an unidentified journalist, from which still photos appear to have been taken. Dkt. 55, p. 7. The video itself is heavily edited, and includes what could fairly be described as belligerent speech from a number of individuals—though QGC and the other Cantrells never appear in it. At one point, a police officer tells the journalist (according to the proffered transcription) "No, you can't come in. Nobody can come in." In addition to having been produced out-of-time, this video embodies all of the defects QGC objects to with 3d-Party video evidence, and should be excluded. Nevertheless, QGC notes that neither the video nor any other evidence shows that QGC did or even could have heard this police officer.

QGC's choice not to dispute other factual contentions is based on the belief that they are not relevant to the disposition of this motion. QGC reserves the right to contest other factual contentions, including the Government's characterization of that evidence, and the admissibility of that evidence, at trial.

## IV. Conclusion

For the foregoing reasons, the Court should DENY the Government's motion.

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